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JAMAL NATHAN DAWOOD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMAL NATHAN DAWOOD,

Defendant.

Case No. 23-cr-00038-JVS

**DEFENDANT’S REPLY IN
SUPPORT OF HIS MOTION TO
EXCLUDE THOMAS
BATTAGLIA’S DEPOSITION
TESTIMONY; EXHIBIT**

Introduction

The law is clear, and the facts are undisputed. Taken together, they compel the conclusion that ninety minutes was not constitutionally sufficient to allow for a full and fair cross-examination of the government’s principal witness in this complex, paper-heavy fraud case.

Beginning with the relevant law, the Sixth Amendment safeguards the defendant’s – not the government’s – right to cross-examination. It requires that “the defense is given a *full and fair* opportunity to probe and expose [the witness’s reliability, credibility, and bias] thereby calling to the attention of the factfinder the reasons for giving scant weight

1 to the witness' testimony." *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).¹ Given the
 2 fundamental nature of this Sixth Amendment right, the Ninth Circuit has "emphasized
 3 the policy favoring expansive witness cross-examination in criminal trials." *United States*
 4 *v. Cazares*, 788 F.3d 956, 983 (9th Cir. 2015).

5 Moving to the facts, the indictment in this case contains 15 counts. Each count is
 6 tied to a different transaction or series of transactions, and each of those transactions
 7 involves multiple contracts and related documents signed or received by Mr. Battaglia.
 8 Thus, as defense counsel consistently told the government before and during the
 9 deposition, the ninety minutes allotted did not provide sufficient time to cross-examine
 10 Mr. Battaglia fully and fairly about most of these documents, which would have
 11 materially impacted the jury's ability to assess his reliability, credibility, and bias.

12 Accordingly, admission of Mr. Battaglia's deposition testimony would violate Mr.
 13 Dawood's Sixth Amendment right to confrontation.

14 Discussion

15 **A. The government's arguments are misplaced.**

16 In its response, the government largely glosses over the relevant law and seeks to
 17 minimize the complexity of this case. It says: "The question posed by this case is simple:
 18 did defendant have Mr. Battaglia's authorization to transfer money from the trust account
 19 into defendant's own accounts, keep it, and spend it for his own purposes, or did
 20 defendant take that money from Mr. Battaglia through fraudulent promises,
 21 misstatements, and omissions?" ECF. 26 at 8. By framing the issue in this way, the
 22 government seeks to convince the Court that this case is uncomplicated, and thus, a mere
 23 90 minutes provided a sufficient opportunity to cross-examine its main witness.

24 But this is not a simple single-count case, like a border bust where the only issue
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 27 ¹ Unless otherwise noted, all internal quotation marks and citations are
 28 omitted, and all emphasis is added.

1 is whether the defendant knew about the drugs hidden in the spare tire. To the contrary,
2 as noted, there are 15 different fraud-related charges that the jury must consider
3 individually based on the documents related to each transaction and the relevant
4 testimony about those transactions. To this end, the jury will be instructed, “A separate
5 crime is charged against the defendant in each count. You must decide each count
6 separately. Your verdict on one count should not control your verdict on any other
7 count.” Ninth Circuit Manual of Model Jury Instructions, Criminal, 6.11.

8 The trial, therefore, will not be an all-or-nothing proposition. The jury, for
9 example, could conclude that certain transactions were authorized and others were not.
10 For this reason, it is critical to Mr. Dawood’s Sixth Amendment rights that be afforded a
11 sufficient opportunity to cross-examine Mr. Battaglia about *all* the transactions
12 underlying each count. Plainly, however, that did not happen during the ninety minutes
13 allotted. And the sole published case relied on by the government proves the point.

14 The government cites *Fenenbock v. Director of Corrections for California*, 692
15 F.3d 910, 919 (9th Cir. 2012), for the proposition that “Courts have repeatedly upheld
16 similar limits on cross-examination.” ECF 26 at 99. But in *Fenenbock*, the trial court
17 placed a limit of **7 hours** on the cross-examination. See 629 F.3d at 920. The Ninth
18 Circuit explained, “Petitioner presents no cogent explanation as to why the time used by
19 his defense counsel at trial (about three hours) plus the unused four hours offered by the
20 trial court would not have sufficed to explore the intended material exhaustively.” *Id.*
21 The Court continued that it did not see why counsel needed more time “to cover four
22 hundred pages of discovery.” *Id.*

23 Here, by contrast, Mr. Dawood was given just 90 minutes to cover over 8,500 pages
24 of discovery. Thus, in comparison, *Fenenbock* strongly supports Mr. Dawood’s position.
25 And this is also true because, in this case, Mr. Dawood has provided a “cogent
26 explanation as to why the time [given to] his defense counsel . . . [c]ould not have sufficed
27 to explore the intended material exhaustively.” *Id.*
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1 Specifically, in his moving papers, Mr. Dawood explained that, during his allotted
2 time, defense counsel was able to begin his cross-examination and cover matters related
3 to the beginning of Mr. Battaglia's relationship with Mr. Dawood. But there was
4 insufficient time to probe Mr. Battaglia's biases, prejudices, and motives for his
5 allegations against Mr. Dawood. More specifically, defense counsel was unable to cross-
6 examine using the numerous documents, wire-transfer records, emails, and other materials
7 demonstrating that, contrary to his direct testimony, Mr. Battaglia knew about and
8 approved. In other words, Mr. Dawood did not have a full and fair opportunity to impeach
9 Mr. Battaglia on the most critical point for the defense – i.e., that Mr. Dawood always
10 acted with Mr. Battaglia's knowledge and permission.

11 On pages 14-15 of his motion, and in counsel's declaration, Mr. Dawood provided
12 multiple specific examples demonstrating how and why counsel needed additional time to
13 conduct a meaningful cross-examination. He now supplements those examples with a
14 further discussion of particular documents and areas of cross-examination that counsel
15 was unable to pursue due to the time limitation. Because the Court has not yet heard the
16 evidence that would explain these documents' significance in the context of the overall
17 case, Mr. Dawood provides a brief overview.

18 **B. Specific examples demonstrating that the 90 minutes did not suffice under the**
19 **Sixth Amendment.**

20 The documents discussed below relate to the transactions forming the basis of
21 specific counts. If counsel had sufficient time, they would have been used for the same
22 basic purpose – to test Mr. Battaglia's assertions (and the government's theory of the case)
23 that he did not know about or authorize the transactions forming the basis for each
24 substantive count.

25 By way of analogy, posit a scenario in which an alleged fraud victim testifies on
26 direct that he did not approve a specific transfer from his account. On cross-examination,
27 the defense would use documents signed by, or sent to, the alleged victim related to that
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1 transfer to impeach the direct testimony. It would then be up to the jury to evaluate the
2 alleged victim's credibility based on his answers to the questions about the documents he
3 signed. That is what Mr. Dawood intended to do here, but the 90-minutes allotted barely
4 allowed him to barely scratch the surface, as the following demonstrates:

5 Beginning with counts one and two. Count 1 charges that, on September 9, 2019,
6 there was a wire transfer in the amount of \$731,989.65 from the Jack J. Battaglia Trust
7 ("Trust Account") to a Bank of America account ending in 1861, an account in the name
8 of TD Capital. Count 2 charges the transfer of \$654,063.80 from the Trust Account to a
9 Bank of America account ending in 6050, in the name of Globe Design.

10 During his deposition, Mr. Battaglia denied knowledge of these transfers.

11 This testimony, however, is impeached by the Profit Sharing Agreement, attached
12 as Exhibit A to Mr. Dawood's moving papers. That agreement was signed by Mr.
13 Battaglia and Mr. Dawood. It strongly suggests that the transfers charged in counts 1 and
14 2 were indeed part of the parties' agreement. And it further supports the defense argument
15 that the Mr. Battaglia knowingly agreed to fund and advance a total sum of \$731,989.65
16 (the amount charged in count 1).

17 Similarly, attached as Exhibit B to the motion was the Agreement for Sale of
18 Membership Interest. This was also signed by Mr. Battaglia and Mr. Dawood. In this
19 agreement, Mr. Dawood agreed to sell a 49% share in Globe Design Build to the Battaglia
20 trust for \$654,063.80, the exact amount of money referenced in Count 2 of the indictment.
21 Thus, contrary to Mr. Battaglia's testimony at the deposition, the document shows he was
22 fully aware that the monies referred to in Count 2 were for a 49% interest in Globe Design.

23 Mr. Dawood, however, did not have sufficient time to question Mr. Battaglia about
24 either of these documents. This is important because, given his signature, Mr. Battaglia
25 would have had to admit that he authorized the transactions in counts 1 and 2, or deny
26 knowledge of the documents. If the former, it would have been exculpatory on its face.
27 If the latter, it would have been material to the jury's assessment of his credibility. As
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1 such, this was an important area of cross-examination that surely would have been
2 permitted during a trial.

3 There are myriad other examples.

4 In counts 3 through 6, for instance, the indictment alleges that various sums were
5 transferred from the trust account to accounts controlled by Mr. Dawood or other
6 individuals with whom he had personal relationships. However, Exhibit C to the motion
7 contains various documents tending to show that Mr. Battaglia was fully aware of these
8 transfers and that they were all made with his consent.

9 These documents support the defense theory that all the charged transactions were
10 completed with Mr. Battaglia's knowledge and consent. Due to time restraints, however,
11 counsel was unable to cross-examine Mr. Battaglia using these exhibits. Again, a jury
12 would want to know how Mr. Battaglia would respond to these documents as to which he
13 was a signatory.

14 The list goes on. Exhibits D and E show that Mr. Battaglia signed off on the sale
15 of the subject residence for \$744,358.00. Indeed, as part of Exhibit E, Mr. Battaglia
16 emailed Mr. Dawood and told him he wanted to sell the property. This document,
17 therefore, would have been used to impeach Mr. Battaglia's deposition testimony that he
18 was unaware that the property had been transferred. But counsel did not have an
19 opportunity to cross-examine Mr. Battaglia about this email before his time ran out.

20 Nor did Mr. Dawood have a chance to impeach Mr. Battaglia with his prior
21 testimony in a civil deposition related to the same allegations underlying this prosecution.
22 A copy of this deposition is attached as Exhibit I and incorporated herein by reference.
23 (Exhibits A through H were previously filed as part of Defendant's Motion to Exclude
24 T.B.'s Deposition Testimony Doc. #25).

25 In many respects, Mr. Battaglia's testimony in the civil deposition was inconsistent
26 with his claims during the criminal deposition. If counsel had the time he would have
27 used the civil deposition to show that, contrary to his testimony during the government's
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1 direct examination: (1) Mr. Battaglia had previously admitted knowing all about his
2 brother's trust; (2) that he was lying about his ownership of the Aquamarina property; (3)
3 that the trusts were prepared by the same attorneys; (4) that he had a copy of the trust
4 within days of his brother's death; and (5) very importantly, that he never gave a copy of
5 the Amended Trust to the government or any of the named beneficiaries in order to conceal
6 his unlawful intent to embezzle his brother's Trust Assets, which were bequeathed to
7 others.

8 Learning about these prior inconsistent statements made under oath during his civil
9 deposition would have been key to the jury's assessment of Mr. Battaglia's veracity.

10 Moving on, Exhibit F relates to the Hawaii Properties. Mr. Battaglia testified he
11 did not know about any sale of these properties. But all the relevant real estate transfer
12 documents were either initiated or signed by Mr. Battaglia. Thus, if he had sufficient time,
13 Mr. Dawood would have used them on cross-examination to impeach Mr. Battaglia's
14 claims.

15 Similarly, during the government's direct examination, Mr. Battaglia testified that
16 he went with the Mr. Dawood to a Bank of America branch in San Clemente to open a
17 bank account for the Trust. Mr. Battaglia claimed that the money in this account was
18 specifically for him and no one else. Mr. Battaglia further maintained, and the government
19 has alleged, that Mr. Dawood made at least six wire transfers from the trust account
20 totaling over 1.4 million dollars, into accounts that the defendant controlled without
21 Mr. Battaglia's knowledge.

22 At the deposition, counsel did not have enough time to question Mr. Battaglia about
23 the fact that he signed agreements authorizing these wire transfers and that the wire
24 transfers *could not have been completed without the personal initiation and confirmation*
25 *of the wires by Mr. Battaglia.* Indeed, there is evidence that before any of the subject
26 transfers took place, a representative of Bank of America called Mr. Battaglia to confirm
27 the wire transfers, which was the only way that the wires could have been approved. But
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again, counsel did not have time to cross-examine Mr. Battaglia about this fact.

Mr. Dawood could go on and on. But the point is clear. Given the complexity of this case and the numerous transactions at issue, ninety minutes was simply insufficient to protect Mr. Dawood's Sixth Amendment Rights. Although the government tries to distract from this fact, its arguments are unavailing. The government focuses on the uncontroversial proposition that district courts have discretion to limit cross-examination. But that discretion is, of course, constrained by the Constitution.

As the Ninth Circuit has clearly held, "while a district court has discretion to limit cross-examination, it may not impose restrictions that limit[] relevant testimony and prejudice[] the defendant." *United States v. Wilmore*, 381 F.3d 868, 873 (9th Cir. 2004). Thus, "[i]f a line of cross-examination is relevant [] it must be allowed[.]" *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999).

For this reason, "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed . . . to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Fowler v. Sacramento County Sheriff's Dep't*, 421 F.3d 1027, 1035 (9th Cir. 2005) (ellipses in original). Here, for all the reasons discussed herein and in his original motion, the ninety-minute time limit precluded Mr. Dawood from engaging in appropriate cross-examination designed to test Mr. Battaglia's credibility and reliability. This Court, therefore, should exclude the deposition testimony.

Respectfully submitted,

Dated: February 20, 2024

/s/ Victor Sherman
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